No. 1326

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VICTOR R. DYDYN,

Petitioner,

—v.—

DEPARTMENT OF LIQUOR CONTROL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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January 29, 1988

QUESTIONS PRESENTED

1. Does Amendment XXI, Section 2, of the United States Constitution expand the police power of state legislatures and administrative agencies, even against the free speech clauses of their own state constitutions, or does it merely qualify or abolish Federal First Amendment limitations upon such power, leaving state constitutional speech clauses intact?

2. Does the Supremacy Clause, U.S. Const. Art. VI, clause 2, require state courts to construe U.S. Const. amendment XXI, section 2 as overriding the free speech clauses of their own state constitutions?

LIST OF ALL PARTIES

The petitioner is Victor R. Dydyn, permittee of the Culinary Cafe, Inc., in Newington, Connecticut. The respondent is the Department of Liquor Control of the State of Connecticut. Paul J. Cianci, former permittee of the Dealer's Choice Lounge, Inc. in Hartford, Connecticut, a party to the proceedings below, has ceased doing business and the proceedings as to him are therefore moot.

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OPINIONS BELOW

The Opinion of the Connecticut Appellate Court, filed on September 22, 1987, is Appendix A. It is published at 12 Conn. App. 455. The Orders of the Supreme Court of the State of Connecticut, denying certification and reconsideration of denial of certification, and filed on October 21, 1987, and November 5, 1987, respectively, are Appendices B and C. The unpublished Ruling of the Superior Court (O'Connor, J.), filed on July 10, 1986, is Appendix D.

JURISDICTION

The judgment and decision of the Connecticut Appellate Court, affirming suspension of the petitioner's liquor license for violating Connecticut liquor regulations governing nude and topless barroom dancing, was entered on September 22, 1987. The Supreme Court of the State of Connecticut, the highest court of the State, denied certification on October 21, 1987, and denied petitioner's Motion for Reconsideration of its denial on November 5, 1987.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Twenty-first Amendment to the United States Constitution, section 2 provides: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Article VI, clause 2, of the United States Constitution, the Supremacy Clause, provides, in relevant part: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Article first, section 4 of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, section 5 of the Connecticut constitution provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

Connecticut General Statutes § 30-6 provides, in relevant part: "There shall be a department of liquor control. The department of liquor control shall have power to enforce the provisions of this chapter, and may make all necessary regulations . . . for that purpose and for carrying out, enforcing and preventing violation of all or any of the provisions of this chapter, for the inspection of permit premises, for insuring sanitary conditions, for insuring proper, safe and orderly conduct of licensed premises and for protecting the public against fraud or overcharge. . . ."

Section 30-6-A24(d) and (e) of the regulations of Connecticut state agencies, governing liquor control, provide in relevant part:

> "(d) No person shall be employed or otherwise used on permit premises while such a person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonably exert control, shall be permitted to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> "(e) No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which simulate: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching, caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No permittee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the department upon written request indicating the desirability and necessity for entertainers to mingle with the patrons."

STATEMENT OF THE CASE

The petitioner's liquor license was suspended by the Connecticut Department of Liquor Control for a total of 45 days, because of four separate violations of the liquor regulations set forth in the immediately preceding section of this petition. The violations allegedly consisted both of various sexual acts, and of nude and topless dancing, by female dancers in the petitioner's employ. The Department did not spell out what portion of the suspensions was based on the sexual acts and what portion was based on the total or partial nudity. The trial court upheld the suspensions, and the petitioner appealed to the Appellate Court.

The petitioner at all times acknowledged that the sexual acts can claim no protection under either the federal or the state Constitutions. He also acknowledged that, although nude and topless dancing are normally protected forms of expression under the First Amendment to the United States Constitution, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed. 2d 648 (1975), the Twenty-first Amendment to the United States Constitution deprives them of such protection in bars. *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972).

The petitioner argued, however, that the Twenty-first Amendment merely repeals federal First Amendment limitations upon the state's police power wherever liquor is served. Its only effect, therefore, is to restore to the states their original, inherent and plenary police power over expressive activity in bars as far as the federal constitution is concerned. According to the petitioner, the Amendment can have no possible impact upon analogous state constitutional speech guarantees, whether those guarantees are construed by state courts to share the same meaning as the federal First Amendment, or are construed more generously. Thus, the petitioner claimed that nude and topless dancing in bars enjoy state constitutional protection, and that Connecticut liquor regulations, which totally prohibit such dancing, are facially invalid.

The Appellate Court disagreed. It did not, however, base its conclusion solely upon its understanding of the Connecticut State Constitution. Rather, it considered itself precluded from giving independent consideration to Connecticut's speech clauses, for two related reasons. First, the Court held that the Twenty-first Amendment does not merely repeal federal First Amendment limitations upon the state's police power, but instead expands that power, so that a state constitutional speech clause could not possibly override it. Second, the Court concluded that, under the Supremacy Clause, U.S. Const. art. IV, clause 2, this additional grant of power becomes part of the state's own constitution. Thus, it appears, a state court could not invalidate state regulations of liquor under a state constitutional speech provision without running afoul of the dominant federal instrument. Implicit in this reasoning is the assumption that the Twenty-first Amendment's "grant" of police power—if a grant it is—accrues only to state legislatures (and state administrative agencies acting pursuant to state legislative authority), rather than to the state as a whole, to be divided between its legislative and judicial branches as its own constitution ordains. Since the Appellate Court's disposition of petitioner's state constitutional claim was dictated by its understanding of federal constitutional law, this petition raises a substantial federal question which this Court has jurisdiction to resolve. *Michigan v. Long*, 463 U.S. 1032 (1983).[1]

Whether the federal Twenty-first Amendment merely repeals federal First Amendment limitations upon the otherwise plenary police power of the states, or grants additional police power to the states—i.e. expands that power even beyond its original, inherent and plenary dimensions—was first raised in petitioner's Brief in the Connecticut Appellate Court, Appendix E, pages 5-12, where he wrote, *inter alia*, "The trial judge erred in mistakenly supposing that the Twenty-first Amendment grants additional police power to the state. . . . Because

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1 Petitioner also raised other state and federal constitutional issues in the courts below, but does not seek review of those issues from this Court.

the police power is all-encompassing . . . it need not and cannot be supplemented with another outside source such as the Twenty-first Amendment. . . . Therefore . . . the Twenty-first Amendment does not *grant* power to the states, but rather *restores* the absolute power of the state to prohibit totally, and consequently to regulate, the sale of alcoholic beverages without federal constitutional interference . . . it does not and cannot repeal the analogous speech clauses of state constitutions." *Id.* at 5-6. He raised the issue again in his Reply Brief before the same Court, Appendix G, pages 2-7, and in his petition for certification to the Supreme Court of the State of Connecticut, Appendix H, pages 1-2, 4-5 and 7-9. The respondent (defendant/appellee below) controverted this argument in its own Appellate Court Brief, Appendix F, pages 8-16.

In that same Brief, the respondent also replied to petitioner's analysis of the Twenty-first Amendment, and its impact upon the state's police power, by asserting that the Supremacy Clause, article VI, clause 2, of the United States Constitution makes the Twenty-first Amendment part of Connecticut's own state Constitution, even though Connecticut has never expressly adopted this amendment. In particular, it wrote: "It is entirely inconsistent to reason that the Twenty-first Amendment power cannot be considered in a state constitutional challenge because it does not exist in the State constitution, and next identify the authority for state action as being the state's police power, which is also not present in the State Constitution . . . The federal Constitution is, in reality, part of the Constitution of every state. U.S. Const., Art. VI, sec. 2 . . ." Appendix F, p. 11.

The Appellate Court agreed with the respondent on both points: That is, that the Twenty-first Amendment expands state police power, rather than merely restoring it by removing federal First Amendment limitations upon the same; and that the federal Supremacy Clause compels the state to accept the Twenty-first Amendment as part of its own state Constitution, overriding whatever state free speech guarantees might otherwise exist. Appendix A, 12 Conn. App. 455, at 461 ("Contrary

to the plaintiffs' view, 'When a State acts to regulate the sale of liquor within its boundaries, its authority stems *both* from its general police power *and* directly from the Twenty-first Amendment to the United States Constitution' [quoting Jason, J., dissenting in *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 243 (1981)] [emphasis in original])" and 462 ("The power conferred by the Twenty-first Amendment does not simply evaporate once the analysis shifts to a determination of the right to free expression under our state Constitution. Rather, this independent, federal right to control the traffic in liquor subsists, and, pursuant to the Supremacy Clause, must be given full recognition and effect, even when we consider the provisions of our own Constitution.")

REASONS FOR GRANTING THE WRIT

1. **The state court's interpretation of the relevant federal constitutional provisions—U.S. Const. amendment XXI, section 2 and U.S. Const. art. VI, clause 2—is plainly in conflict with the applicable decisions of this Court, and improperly inhibits state courts from using their own state Constitutions to expand individual liberties beyond the federally-mandated minimum. This court has consistently encouraged such use of state Constitutions as a hallmark of federalism.**

The petitioner understands that this Court does not sit to correct state court decisions interpreting state Constitutions. Such decisions, whether right or wrong, normally rest by definition upon "adequate state grounds" that preclude federal judicial review. *Herb v. Pitcairn*, 324 U.S. 117 (1945). Here, however, the Connecticut Appellate Court decided two threshold federal questions in a way that foreclosed it from entertaining petitioner's state constitutional claims. What petitioner seeks is review, by this Court, of those threshold federal questions. Ironically, it is the Appellate Court and respondent who ignore the federalism values of the adequate state grounds

doctrine by insisting that the federal Constitution somehow controls the allocation of authority, under state constitutions, between state legislatures and state courts.

The Appellate Court's resolution of the two threshold federal questions was plainly and egregiously wrong. In the first place, the federal Twenty-first Amendment cannot and does not "expand" state police power under the federal Constitution. It is literally hornbook law that the state police power is infinite, except insofar as the federal Constitution may specifically limit it. Nowak, Rotunda and Young, *Constitutional Law*, (3rd ed.) at 111. The relevant language in Nowak is worth setting forth in full:

> "For the purposes of federal law, state governments (or their subsidiaries) are not creatures of limited powers: They are recognized as having a general 'police power'—the inherent power to protect the health, safety, welfare and morals of persons within their jurisdiction. . . . Federal courts test only whether a state act violates some specific check on state power contained in the federal Constitution." *Id.*

This principle has been recognized since the earliest decisions of this Court. *Mayor, Aldermen and Commonalty of City of N.Y. v. Miln*, 36 U.S. 102, 141 (1837); *Thurlow v. Com. of Mass.*, 46 U.S. 504, 527-29 (1874); *Newton v. Mahoning County Com'rs.*, 100 U.S. 548, 559 (1879).

"Specific checks on state power" in the federal Constitution include, of course, those portions of the first eight Amendments which the Fourteenth Amendment incorporates and applies against the states. The First Amendment is among them. The Twenty-first Amendment removes this latter limitation, *pro tanto*, and thereby restores the state police power to its original unlimited extent. This is a far cry from saying, as the Appellate Court maintained, that the Amendment augments the original power. One cannot augment infinity.

The significance of the Court's error is clear. If the Twenty-first Amendment broadens the state's police power, which it

does not, then that power might indeed be extensive enough to override statute constitutional speech rights. If, however, the Amendment merely releases the state from the federal constitutional constraints imposed by the First Amendment, then the state Court must address the question that the Connecticut Appellate Court never really reached: namely, the impact of internal state constitutional limitations upon state legislative and administrative authority.[2]

The Appellate Court did, to be sure resolve one state constitutional speech issue. It construed its own free speech clauses as being no broader than the Federal First Amendment requires. 12 Conn. App. at 455-56. This construction is obviously not open to federal constitutional review. But the Court did not measure those clauses, so construed, against the police power's true parameters. Its omission was due to the following faulty syllogism: (a) the Twenty-first Amendment expands the state's police power; (b) the state's police power, thus expanded, overrides the federal free speech clause; (c) the federal and state free speech clauses have exactly the same meaning; *ergo* (d) the state's police power, as expanded, overrides the

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2 The Appellate Court evidently misunderstood *LaRue's* statement that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something something more than the normal state authority over public health, welfare and morals." 404 U.S. at 114, quoted 12 Conn. App. at 461. The Amendment "confers" authority, not by extending the original boundaries of the police power—an impossibility, for the original power was boundless—but rather by restoring the power that the First Amendment had taken away. The Appellate Court also misunderstood an important phrase in the Twenty-first Amendment itself. It quoted the following language: "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." 12 Conn. App. 461 (emphasis added by the Court). The Court took this language to grant extraordinary powers to state legislative and administrative agencies, even against their own state constitutions. It offered no reason, however, why "laws" does not include state constitutional law, as well as state statutes and administrative rules. Cf. U.S. Cons. Article VI, clause 2: a constitution is "the supreme *Law*. . . (emphasis added).

state free speech clauses as well as the federal. The syllogism fails at its starting point, for the Amendment does not expand state police power at all, but rather restores that power to the dimensions it had occupied before the First Amendment was adopted. The petitioner asks this Court to correct this fundamental federal constitutional error, so that henceforward state courts can strike a proper balance.

The Appellate Court's second error was even more serious, because, in addition to being egregious, it threatens the freedom of the states to advance the values of federalism by fashioning new individual liberties, not only in the realm of liquor control, but possibly in other areas as well. The error lies in the holding that the federal Supremacy Clause requires states to incorporate the Twenty-first Amendment into their own constitutions.

This aspect of the decision is unprecedented, and its potential consequences are both harrowing and bizarre. It is one thing to recognize that, under the Supremacy Clause, state constitutions must incorporate minimum federal ***rights***. *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed. 2d 741 (1980); *Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 103 S.Ct. 1070, 71 L.Ed. 2d 152 (1982). It is quite another to say that the Clause also requires those constitutions to concede to state legislatures all of the ***powers*** that the federal Constitution allows them. If that is correct, the Department of Liquor Control can make the extraordinary argument that Connecticut state courts could not invalidate the challenged liquor regulations without violating superior federal law. Had they done so in the present case, the Department could have sought review in this Court. More generally, and more ominously, state courts would never be free to expand individual liberties beyond the federally-mandated minimum. Any such expansions would no longer be insulated from federal review under the "adequate state grounds" doctrine; instead, they could be challenged on the same Supremacy Clause principle that the Appellate Court and the respondent advance here. The principle, therefore, clashes with this

Court's holdings in *Prune Yard* and *Mesquite*, *supra*, and with the vision of federalism that inspired them. See, also, *Michigan v. Long*, *supra*, which expresses the same vision by insisting that the state court decision must clearly rest upon an independent interpretation of the state's own constitution. Thus, the problem is not merely that the Appellate Court was wrong. It is that its error bodes ill for the future of state autonomy, in the field of liquor control and perhaps even beyond.

2. In the aftermath of *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), state Courts (including courts of last resort) have been confused and in conflict as to whether the Twenty-first Amendment affects state constitutional free speech limitations upon state regulation of liquor. This court should clarify whether state Courts are free, in this area, to interpret their state constitutional speech clauses as they think best.

California v. LaRue was decided in 1972. Though its principles seem, to petitioner, to be clear enough, state courts have divided sharply over its impact on state constitutions. At least five states, besides Connecticut, have examined *LaRue* in state constitutional challenges to nude dancing regulations. Four have agreed with petitioner that the Twenty-first Amendment neither broadens state police powers nor overrides state free speech guarantees. *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 429 N.E.2d 765, 769, 445 N.Y.S. 2d 87 (1981) (*Bellanca II*) (on remand from the United States Supreme Court), cert. denied 465 U.S. 1006, 102 S.Ct. 2294, 73 L.Ed. 2d 1300 (1982); *Mickens v. Kodiak*, 640 P.2d 818, 821 (Alaska 1982); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151, 1155 (1978); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 203-204 n. 3 (Fla. 1985).[3] One state

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3 The Appellate Court listed *Del Percio* as one of the cases that reject petitioners position. 12 Conn. App. at 460. That is plainly incorrect. See 476 So. 2d at 203-204 n.3.

Court has taken the same view as *Dydyn*. *Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280, 1284 (1980). All of these decisions, other than *Dydyn* itself, were by state courts of last resort. The proliferation of state lawsuits shows that the question is one of national importance. The differing results show lingering uncertainty which this Court should take the opportunity to resolve. If petitioner is wrong in his understanding of the Twenty-first Amendment, this Court can say so, and thereby ensure that state courts will no longer err as four such Courts have done already. If petitioner is correct, this Court can dispel the present confusion and free state courts—including, on remand, Connecticut's—to interpret their own Constitutions as they think best. Those Courts can then turn to other issues that *LaRue* has left open: for instance, whether the Twenty-first Amendment was really essential to *LaRue's* outcome, or whether, instead, the police power alone overrides whatever expressive values nude barroom dancing may contain. See *Del Percio*, *supra*, 476 So. 2d at 204.

CONCLUSION

For each of the foregoing reasons, petitioner, VICTOR R. DYDYN, prays that this Court grant his petition for a writ of certiorari to the Appellate Court of the State of Connecticut.

Respectfully submitted,

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January 29, 1988

APPENDIX

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A-1

VICTOR R. DYDYN ET AL.

—v.—

DEPARTMENT OF LIQUOR CONTROL

(5302), (5304), (5306), (5308)

PAUL J. CIANCI ET AL.

—v.—

DEPARTMENT OF LIQUOR CONTROL

(5303), (5305), (5307), (5309)

HULL, SPALLONE and BIELUCH, *Js.*

The plaintiffs, whose liquor permits had been suspended by the defendant department of liquor control for violating the department's regulation against nude or semi-nude entertainment, appealed to the trial court. The trial court upheld the suspensions and the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that because there is no state counterpart to the twenty-first amendment to the federal constitution regarding the authority to control the sale of liquor, the regulation in question violates their right to free speech guaranteed by the Connecticut constitution; the state's power, established by the federal constitution, to ban the sale of liquor includes the power to ban the sale of liquor on premises where nude or semi-nude entertainment occurs.

2. There was no merit to the plaintiffs' claim that the regulation in question violates the state equal rights amendment because it creates a suspect class by specifically referring to the female anatomy; the classification created by the regulation is substantially related to an important governmental interest.

3. The plaintiffs' claims that there were procedural deficiencies in the adoption of the challenged regulation were without merit; that regulation did not exceed the permissible limits of the department's rulemaking authority.

Argued June 4—decision released September 22, 1987

Appeals from eight decisions by the defendant which suspended the plaintiffs' liquor permits, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the cases were consolidated and tried to the court, *O'Connor, J.*; judgments dismissing the appeals, from which the plaintiffs appealed to this court. *No error.*

Martin Marqulies, with whom were *Carolyn Comerford* and *Leslie Byelas*, for the appellants (plaintiffs).

Robert F. Vacchelli, assistant attorney general, with whom, on the brief, were *Joseph I. Lieberman*, attorney general, and *Richard M. Sheridan*, assistant attorney general, for the appellee (defendant).

HULL, J. The plaintiffs in this appeal are permittees of establishments that dispense alcoholic beverages and also provide live entertainment by female dancers. Pursuant to General Statutes § 4-183,[1] the plaintiffs sought judicial review in the trial court from decisions of the department of liquor control (department) suspending their liquor permits. The trial court upheld the department's suspensions. In this appeal, the plaintiffs claim that the trial court erred (1) in upholding the constitutionality of § 30-6-A24(d) and (e) of the regulations of Connecticut state agencies, concerning liquor control,[2] under

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1 General Statutes § 4-183 provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review by way of appeal under this chapter, provided, in case of conflict between this chapter and federal statutes or regulations relating to limitations of periods of time, procedures for filing appeals or jurisdiction or venue of any court or tribunal, such federal provisions shall prevail. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

2 Section 30-6-A24(d) and (e) of the regulations of Connecticut state agencies, governing liquor control, provide in relevant part: "(d) No person shall be employed or otherwise used on permit premises while such a person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonably exert control, shall be permitted to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

"(e) No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which simulate: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching, caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No permittee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the

the twenty-first amendment to the United States constitution,[3] (2) in concluding that the challenged regulation does not infringe on the plaintiffs' rights to free expression under article first, §§ 4 and 5 of the Connecticut constitution,[4] (3) in concluding that the challenged regulation does not infringe on the plaintiffs' equal protection rights under article first, §§ 1 and 20 of the Connecticut constitution,[5] and (4) in holding that the challenged regulation does not violate the plaintiffs' due process rights and that the department does not act in excess of its authority in promulgating the regulation.

The following facts are not in dispute. The plaintiff Victor R. Dydyn is the permittee of the Culinary Cafe, Inc., in Newington. The plaintiff Paul J. Cianci is the permittee of the

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buttocks, vulva or genitals. Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the department upon written request indicating the desirability and necessity for entertainers to mingle with the patrons."

3 The United States Constitution, amendment XXI, § 2 provides in relevant part: "The transportation or importation *into any State*, Territory or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." (Emphasis added.)

4 Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, § 5, of the Connecticut constitution provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

5 Article first, § 1, of the Connecticut constitution provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

Article first, § 20, of the Connecticut constitution provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."

Dealer's Choice Lounge, Inc., in Hartford. In each case,[6] female dancers were observed by plainclothed detectives to be performing at the permit premises in various states of nudity, in violation of liquor control regulation § 30-6-A24. In particular cases, dancers were also observed fondling their breasts and genital areas, allowing customers to place money in their costumes, mingling with and kissing patrons, and simulating sexual intercourse during their routines. In the cases involving Cianci and the Dealer's Choice Lounge, Inc., the permit to sell liquor was suspended by the department for a total of forty-five days. In the cases involving Dydyn and the Culinary Cafe, Inc., the permit was suspended for a total of thirty-five days.

I

The plaintiffs' first claim is that the court erred in upholding the constitutionality of the department's regulation under the twenty-first amendment to the federal constitution. Their second claim is that the department's regulation prohibiting nude dancing in establishments with liquor permits is violative of their constitutional right to free speech under article first, §§ 4 and 5 of the Connecticut constitution. These arguments are in effect, that nude and semi-nude dancing is a protected form of expression that cannot be curtailed by this regulation. We disagree.

The provisions of section 2 of the twenty-first amendment to the United States constitution have been interpreted as granting the states virtually complete control over whether to permit the importation and sale of liquor. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980).[7] The amendment has

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6 This case is comprised of eight separate appeals, four involving each plaintiff. They have been combined for hearing and decision.

7 In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum Inc.*, 445 U.S. 97, 107, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), the court stated that "[i]n determining state powers under the Twenty-first Amendment, [this] court has focused primarily on the language of the provision rather than the

been recognized as conferring more than the normal state authority over public health, welfare and morals. *California* v. *LaRue*, 409 U.S. 109, 114, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972). Pursuant to the twenty-first amendment, a state can ban topless dancing and other nude conduct, regardless of whether it is obscene, as part of its liquor licensing regulatory scheme. See *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981) (*Bellanca I*); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); *California v. LaRue*, supra.[8] The United States Supreme Court has held that a state's power to ban the sale of alcoholic beverages under the twenty-first amendment entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs. *Bellanca I*, supra, 717.

The plaintiffs, however, do not make their argument under the federal constitution. They assert that the department's regulation is vulnerable under the free speech provisions of our state constitution because there is no state constitutional enactment similar to the twenty-first amendment. There is a split of authority as to the effect of a lack of a provision similar to the twenty-first amendment in a state's constitution. Some jurisdictions hold that the twenty-first amendment of the federal constitution is not applicable to the states. See *Bellanca* v. *New York State Liquor Authority*, 54 N.Y.2d 228, 429 N.E.2d 765,

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history behind it. *State Board* v. *Young's Market Co.*, 299 U.S. 59, 63-64 [57 S. Ct. 77, 81 L. Ed. 38, reh. denied, 299 U.S. 623, 57 S. Ct. 229, 81 L. Ed. 458] (1936)." In a footnote, the court went on to state that this "approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal . . . ." Id., 107 n.10.

8 The power to regulate liquor is not limitless, however. The states still cannot "insulate the liquor industry from the Fourteenth Amendment's requirement of equal protection. *Craig* v. *Boren*, 429 U.S. 190, 204-209 [97 S. Ct. 451, 50 L. Ed. 2d 397] (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U.S. 400, 406, [81 S. Ct. 507, 27 L. Ed. 2d 515] (1971)." *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 108, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980).

445 N.Y.S.2d 87 (1981) (*Bellanca II*) (on remand from the United States Supreme Court); see also *Mickens* v. *Kodiak*, 640 P.2d 818 (Alaska 1982); *Commonwealth* v. *Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978). Other jurisdictions hold that the twenty-first amendment is applicable to the states. See *Daytona Beach* v. *Del Percio*, 476 So.2d 197 (Fla. 1985); and *Nall* v. *Basa*, 95 N.M. 783, 626 P.2d 1280 (1980).

We find logic in the latter cases, and in the dissents in *Bellanca II*. "The Supreme Court has flatly and squarely held that the 'State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. . . . It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold.' (*Bellanca I*, supra, 715). To now require, as a precondition to the exercise of such power in a manner expressly condoned by the highest court of this Nation, that the State must enact its own counterpart of the Twenty-first Amendment, is without reason or authority." *Bellanca II*, supra, 238-39 (Gabrielli, J., dissenting).

Contrary to the plaintiffs' view, "when a State acts to regulate the sale of liquor within its boundaries, its authority stems from *both* its general police power *and* directly from the Twenty-first Amendment to the United States Constitution. Indeed, rather than merely restoring to the States their pre-existing police power over the sale of alcoholic beverages by repealing the Eighteenth Amendment, the second section of the Twenty-first Amendment expressly reserves to the States a power to regulate traffic in liquor: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.' Thus, although the States 'require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals.' (*California*

v. *LaRue*, [supra]). This independent right to regulate the sale of liquor under the Federal Constitution has been interpreted by the Supreme Court as not only creating an exception to the commerce clause (e.g., *J. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 41-42 [86 S. Ct. 1254, 16 L. Ed. 2d 336, reh. denied, 384 U.S. 767, 86 S. Ct. 1583, 16 L. Ed. 2d 679 (1966); *Ziffrin, Inc.* v. *Reeves*, 308 US 132 [60 S. Ct. 163, 84 L. Ed. 128 (1939); *State Board* v. *Young's Market Co.*, 299 US 59 [57 S. Ct. 77, 81 L. Ed. 38, reh. denied, 299 U.S. 623, 57 S. Ct. 229, 81 L. Ed. 458 (1936); but, more recently, as qualifying rights guaranteed by the First Amendment as well—at least insofar as certain forms of nude and partially nude entertainment are concerned. ([*Bellanca I*, supra]; *California* v. *LaRue*, supra.)" *Bellanca II*, supra, 243-44 (Jason, J., dissenting). This federally recognized power on the part of the states to control the commercial distribution of alcoholic beverages within their respective boundaries does not exist in a vacuum; nor is it limited to the confines of the federal constitution. The power conferred by the twenty-first amendment does not simply evaporate once the analysis shifts to a determination of the right to free expression under our state constitution. Rather, this independent, federal right to control the traffic in liquor subsists, and, pursuant to the supremacy clause,[9] must be given full recognition and effect, even when we consider the provisions of our own constitution.

The plaintiffs urge us, even if we find the twenty-first amendment applicable to the state constitution, to read the free speech provision of the Connecticut constitution more broadly than that of the federal constitution, thus making the protections greater under the state constitution. This we decline to do. A similar request was presented to our Supreme Court in *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984). In *Cologne*, the plaintiffs urged the court to find

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9 The supremacy clause; U.S. Const., art. VI clause 2; provides in relevant part: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

that the Connecticut constitution provides greater protection to expressive activity on private property than does the federal constitution. Our Supreme Court refused to do so, finding nothing in the history of the Connecticut constitution to warrant a distinction between the Connecticut and federal free speech provisions. Id., 62-63. Similarly, in the present case, we find the variations in phraseology between the federal and state constitutional free speech provisions to be without relevant significance. On previous freedom of speech issues, our courts have adopted the reasoning of cases interpreting the first amendment of the United States constitution. See *Cologne* v. *Westfarms Associates*, supra; *State* v. *Andrews*, 150 Conn. 92, 186 A.2d 546 (1962); *State* v. *Cantwell*, 126 Conn. 1, 8 A.2d 533 (1939). The plaintiffs have given us no reason or authority for the proposition that the state freedom of speech provisions should be read more broadly than their federal counterparts.[10] We therefore adopt the reasoning and result of the United States Supreme Court decision in *Bellanca I*, supra, *Doran* v. *Salem Inn, Inc.*, supra, and *California* v. *LaRue*, supra, that the "State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where [nude or] topless dancing occurs." *Bellanca I*, supra, 717. Thus, the trial court correctly upheld the department's determination in this respect.

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10 The plaintiffs also assert that there is a fundamental first amendment right to freedom of expression involved in this case. We disagree. The regulation in question does not prohibit nude or semi-nude dancing. It only regulates liquor sales. A permit to sell liquor is a personal privilege, good for one year after issuance and revocable in the discretion of the department, subject to appeal. See General Statute § 30-14. Moreover, one does not have a fundamental right to a liquor permit. See *Joseph H. Reinfeld, Inc.* v. *Schieffelin & Co.*, 94 N.J. 400, 466 A.2d 563 (1983); *Three K. C.* v. *Richter* 279 N.W. 2d 268, 275 (Iowa 1979).

II

The plaintiffs' next argument is that the regulation violates their equal protection rights under the Connecticut constitution, article first, §§ 1 and 20. They argue that the regulation is invalid under the state equal rights amendment because, by specifically referring to female anatomy, it creates a suspect class. In *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982), the United States Supreme Court enunciated an "intermediate" standard for application to gender-based classifications. Under that standard, a statute or regulation which treats males and females differently violates the equal protection clause unless the classification is *substantially related to the achievement of an important government interest*. Id., 724. The trial court in this case found that the regulation was not gender-based and therefore did not require review under the standard set forth in *Hogan*. We are not persuaded, however, by the argument that the regulation does not classify on the basis of sex. When a statute or regulation distinguishes between male and female anatomy, we hold that the test created in *Hogan* must be applied. It does not necessarily follow, however, that the application of the *Hogan* test will alter the outcome of the decision.

Although the plaintiffs attempt to blur the clear distinction, there can be no doubt that in our society female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal. See *Seattle* v. *Buchanan*, 90 Wash. 2d 584, 587, 584 P.2d 918 (1978); *People* v. *Craft*, 134 Misc. 2d 121, 509 N.Y.S. 2d 1005 (1986). Further, courts have held that "[i]n our culture, for the purpose of this type of ordinance, female breasts are a justifiable basis for a gender-based classification. See generally *Mississippi University for Women* v. *Hogan*, [supra]." *Tolbert* v. *Memphis*, 568 F. Sup. 1285, 1290 (W.D. Tenn. 1983). The record before us indicates that establishments which feature female topless dancers have a higher rate of public disturbance than those that do not offer such entertainment. As in the cases cited above, there was

testimony at the permit revocation hearings that a large number of fights and arrests for prostitution and public indecency occur at establishments featuring female dancers. We conclude that the classification created by the department's regulation is substantially related to an important governmental interest, and we therefore find no merit to the plaintiffs' claim.

III

The plaintiffs' final argument is twofold. The first claim is that the department acted outside its scope of authority in promulgating the regulation in question. The second claim is that due process was not afforded to the plaintiffs because the regulation was written without the benefit of any "tests, reports, surveys, hearings or witnesses," and because of a lack of a documented basis for the departments "findings and conclusions."

General Statutes § 30-6 grants to the department the broad power to "make all necessary regulations . . . for insuring proper, safe and orderly conduct of licensed premises." The challenged regulation does not exceed the permissible limits of the department's rulemaking authority. See *Dadiskos* v. *Liquor Control Commission*, 150 Conn. 422, 427-28, 190 A.2d 490 (1963).

The department's regulation prohibiting nude and semi-nude dancing in establishments with liquor permits is clearly designed to reduce the number of incidents of unlawful behavior and disorderly conduct in bars.[11] The need for this type of regulation has been repeatedly upheld. *California* v. *LaRue*,

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11 See, e.g., comments of Commissioner David L. Snyder at the public hearing on the regulation (1976): "I think also it should be pointed out that it has been the experience of this Commissioner that this regulation served to prevent unlawful and disorderly conduct on the permit premises. We have had cases, where after a violation of this regulation has occurred, there have been brawls. There have been arrests for sexual contact. It has served a purpose and it continues to serve a purpose. I can only speak for myself, but that has been my experience."

supra, 116;[12] *Tolbert* v. *Memphis*, supra, 1290. In fact, this very regulation was held to be rationally related to its purpose and was therefore deemed constitutional in *Winer* v. *Healy*, Civ. No. H-79-267 (D. Conn. 1979), and in *Inturri* v. *Healy*, 426 F. Sup. 543 (D. Conn. 1977).

Moreover, it must be noted that at the time the regulation was promulgated, the Uniform Administrative Procedure Act did not require that "findings and conclusions" be made before regulations could be enacted by an administrative agency.[13]

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12 The transcript of the March 26, 1976 hearing on the regulation, which is part of the record before us, reflects that the proposed regulations were in fact modeled after the California regulations found constitutional in *California* v. *LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972), reh. denied, 410 U.S. 948, 93 S. Ct., 1351, 35 L. Ed. 2d 615 (1973). In *LaRue*, the court stated: "Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would require its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases." Id., 116. Further, in *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714, 718-19, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981), the court made the broad statements that " '[i]t has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law. . . .' "

13 It should also be noted that the purpose of the regulation was not to create an entirely new regulatory scheme, but to revamp regulations already in existence. The predecessor to the challenged regulation read in relevant part as follows:

"(a) No disturbances, lewdness, immoral activities, brawls, unnecessary noises, including loud and disturbing music, unlawful conduct or gambling of any kind except where provided by Public Act 865 of the 1971 General Assembly, and no slot machines or gambling devices which may be used for the purpose of securing money or any other valuable things, shall be permitted or suffered upon any permit premises, nor shall such premises be conducted in such a manner as to constitute a nuisance.

Courts will not, sua sponte, require agencies to adopt procedures beyond those required by the Administrative Procedure Act. *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978). We therefore consider the plaintiffs' arguments regarding procedural deficiencies to be without merit.[14]

There is no error.

In this opinion the other judges concurred.

"(b) The presence of dice or cards with money on tables or bars in any permit premises shall be considered as prima facie evidence of gambling.

"(c) No on-premises consumption place of business, such as a restaurant, tavern, hotel, cafe or club, shall permit entertainment consisting or impersonations either of females by males or of males by females, nor shall any permittee of any such establishment advertise, give, permit or participate in any obscene, indecent, immoral or impure show or entertainment. No such premises shall be conducted in such a manner as to constitute a nuisance by permitting an intoxicated person or persons to loiter thereon."

14 Further, General Statutes (Rev. to 1985) § 4-168(d) provides in part: "a proceeding to contest any regulation on the ground of noncompliance with the procedural requirements of this section shall be commenced within two years from the effective date of the regulation." The department's amended regulation took effect in December of 1976. The earliest of the consolidated cases commenced in 1981. The plaintiffs are therefore barred by General Statutes § 4-168(d) from challenging the agency's procedural compliance in amending the regulations at issue.

SUPREME COURT

STATE OF CONNECTICUT

No. PSC-87-1049

VICTOR R. DYDYN et al.

—v.—

DEPARTMENT OF LIQUOR CONTROL

ORDER OF PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiffs for certification to appeal from the Appellate Court (12 Conn. App. 455) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ ALAN M. GANNUSCIO
Assistant Clerk-Appellate

Dated: October 21, 1987.

Notice to: 10/21/87
Clerk, Superior Court, Hartford, 261814
Clerk, Appellate Court

Leslie Byelas
Martin Margulies, pro hac vice
Joseph I. Lieberman, A.G.
Robert F. Vacchelli, A.A.G.
Richard Sheridan, A.A.G.

Leslie Byelas in support of petition.

SUPREME COURT

STATE OF CONNECTICUT

No. PSC-87-1049

VICTOR R. DYDYN ET AL:

—v.—

DEPARTMENT OF LIQUOR CONTROL

ORDER

The motion of the plaintiffs, filed October 30, 1987, for reconsideration of the denial of certification, having been presented to the court, it is hereby

ORDERED DENIED.

BY THE COURT,

/s/ MICHELE T. ANGERS
Assistant Clerk-Appellate

NOTICE SENT: 11-5-87
Leslie Byelas
Martin B. Margulies
Robert F. Vacchelli, A.A.G.
Clerk, Superior Court, Hartford

SUPERIOR COURT

JUDICIAL DISTRICT AT HARTFORD

July 10, 1986

No. 26 18 14

VICTOR R. DYDYN, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 26 78 67

PAUL J. CIANCI, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 27 77 29

VICTOR R. DYDYN, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 28 77 27

PAUL J. CIANCI, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 28 77 28

VICTOR R. DYDYN, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 29 44 22

VICTOR R. DYDYN, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 29 30 93

PAUL J. CIANCI, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

No. 30 20 19

PAUL J. CIANCI, ET AL

—v.—

DIVISION OF LIQUOR CONTROL

MEMORANDUM OF DECISION

The plaintiffs, Dydyn and Cianci, are the holders of cafe liquor permits issued by the state. The above entitled matters are eight consolidated administrative appeals from decisions made by the defendant, the Division of Liquor Control (hereinafter "Division"). The parties have stipulated that each action involves the same issues and essentially identical fact patterns and that one decision will be dispositive of these matters.

Pursuant to Connecticut General Statutes Section 4-183 (revised to 1985), the plaintiffs appeal from the decisions of the Division suspending the plaintiffs' cafe permit for violation of the Division's nude conduct regulations contained in section 30-6-A24(d) and (e). The permits were suspended as a result of findings that dancers employed by the plaintiffs violated the regulations by performing nude or seminude, fondling themselves and/or mingling with customers.

The plaintiffs do not dispute these findings. Instead, the plaintiffs challenge the constitutionality of the Division's nude conduct regulations. The plaintiffs claim a deprivation of due process and equal protection through violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article First of the Connecticut Constitution. In support of their claims, the plaintiffs allege that the regulations: (1) were improperly promulgated, (2) have no rational basis, (3) consti-

tute a gender based classification and (4) violate their right to free expression.

The plaintiffs seek a reversal of the Division's decision, a declaration that regulations section 30-6-A24(d) and (e)[1] are unconstitutional, a stay of the suspension order and such other relief as is proper.

The pertinent provisions of said regulations are as follows:

> "(d) No person shall be employed or otherwise used on permit premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonably exert control, shall be permitted to touch, caress or fondle the breasts, buttocks, anus, or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> "(e) No 'live' entertainment shall be permitted except in accordance with prior written permission of the division. No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which simulate: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching, caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No permitee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Entertainer must perform in one location and entertainers may not mingle with the

patrons. However, the prohibition contained in the last sentence may be waived by the division upon written request indicating the desirability and necessity for entertainers to mingle with the patrons."

I. JURISDICTION

An appeal from a decision of the Division of Liquor Control is authorized pursuant to Connecticut General Statutes Section 30-60 (revised to 1984). A person who has exhausted all administrative remedies available and who is aggrieved by a final decision in a contested case may appeal to the Superior Court. Connecticut General Statutes Section 4-183 (revised to 1985).

A. *Aggrievement*

Connecticut General Statutes Section 30-60 provides that ". . . any permittee whose permit is revoked or suspended by the department of liquor control . . . may appeal therefrom in accordance with section 4-183." Plaintiffs' cafe permits were suspended by the Division of Liquor Control, and therefore the plaintiffs are aggrieved by the decisions of the Division.

B. *Exhaustion*

In order to appeal to the Superior Court the plaintiff must first exhaust all administrative remedies. *Connecticut Life & Health ins. Guaranty Assn. v. Jackson*, 173 Conn. 352 (1977). The plaintiffs are appealing from the final decisions of the Division of Liquor Control and thus have exhausted all administrative remedies.

II. SUBSTANTIVE REVIEW

"On an appeal from a decision of the liquor control commission, it is the function of the court to determine whether the commission upon the facts has mistaken the law and so has acted illegally, or whether it has reached a conclusion untenable in the light of logic and reason and by so doing has arbitrarily

abused its discretion." *Brown v. Liquor Control Commission*, 176 Conn. 428, 431 (1979).

The plaintiffs contend that the regulations in question were improperly promulgated. Connecticut General Statutes Section 4-168(d) (revised to 1985) states in part that "[a] proceeding to contest any regulation on the ground of non-compliance with the procedural requirements of this section shall be commenced within two years from the effective date of the regulation." The regulation as amended took effect in December of 1976. [For proceedings on amendment of the regulations, *see* Record (Permittee's Exhibit 1)]. The earliest of the consolidated cases commenced in 1981. Therefore the plaintiffs are barred by Section 4-168(d) from challenging the agency's procedural compliance in amending the regulations at issue. *Cianci v. Division of Liquor Control*, #25 27 83; *Dydyn v. Division of Liquor Control*, #24 43 00, Judicial District of Hartford at Hartford, Memorandum of Decision, August 5, 1981, Morelli, J. (hereinafter "*Cianci-Dydyn I*").

The plaintiffs also challenge the promulgation of the regulations on constitutional grounds claiming a violation of their due process rights in that the regulations have no rational basis. An agency which has the authority to enact regulations is vested with a large measure of discretion and the burden of showing improper action rests on the party which so claims. *Aaron v. Conservation Commissioners*, 183 Conn. 532, 537 (1981). Likewise, the burden of proving unconstitutionality is on the plaintiff. *Langs v. Harden*, 165 Conn. 490, 502 (1973). An examination of the record indicates that the plaintiffs have failed to carry this burden. The evidence offered established compliance with notice and hearing requirements and the Commission's intent to prevent unlawful and disorderly conduct on permit premises. In *Inturri v. Healy*, 426 F.Supp. 543 (1977), the United States District Court of Connecticut held these same Connecticut regulations to be rational and constitutional on their face pursuant to *California v. LaRue*, 409 U.S. 109 (1972). The Court finds that the challenged regulations are rationally related to the furtherance of a legitimate state

interest, and therefore there is no due process violation as to the promulgation of the regulations. *See Cianci-Dydyn I.*

The plaintiffs' next claim is that the regulations violate the equal protection clause of the constitution by establishing a gender based classification. Judge Morelli in *Cianci-Dydyn I*, at page 8 states, "The language of the regulations refers to 'persons' and 'entertainers'; the only differentiating language refers to the 'female breast' and 'vulva', merely reflecting obvious anatomical differences between males and females." The Court finds that the regulations, on their face, do not create a gender based classification and further finds that the plaintiffs' claim of discriminatory enforcement of the regulations is not supported by the record. *See* Record #3; 3L at 15-18. In a ruling in the United States District Court of Connecticut on a motion for preliminary injunction, Judge Blumenfeld upheld the instant regulations in a challenge by a nude performer who sought to enjoin the enforcement of said regulations. *Weiner v. Healy* (D. Conn. Civil No. H-79-267). Based on the foregoing, the Court finds that no equal protection violation exists. *See also, Cianci-Dydyn I.*

The plaintiffs' final contention is that the regulations violate their right to free expression guaranteed by Article First of the Connecticut Constitution. Connecticut's liquor control regulations, section 30-6-A24(d) and (e), do not violate the plaintiffs' constitutional rights under the First and Fourteenth Amendments of the U.S. Constitution. *Inturri v. Healy*, 426 F. Supp. 543, 550 (D. Conn. 1977). *See also New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 402 U.S. 109 (1972). The critical factor in upholding such regulations is that the prohibition applies only to liquor establishments. *LaRue*, 402 U.S. at 114, 118. The Supreme Court has stated that the state's power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries includes the lesser power to ban the sale of liquor on premises where topless dancing occurs. *Bellanca*, 452 U.S. at 361.

The plaintiffs argue that Article First of the Connecticut Constitution protects their right to present nude entertainment in their bars. Although the states are entitled to afford greater individual rights than those granted under federal law, *Cologne v. Westfarms Associates*, 192 Conn. 48, 57 (1984), the regulations in question do not violate the free speech provisions of Article First of the Connecticut Constitution. *Tannenbaum v. State of Connecticut, Department of Business Regulation, Division of Liquor Control*, Docket No. 28 62 71, Judicial District of Hartford at Hartford, Memorandum of Decision, August 28, 1985, Ramsey, J. In *Tannenbaum* the court, at page 5, stated:

> "Thus, I find no violation of the constitutional provision guaranteeing freedom of speech, to wit; nude dancing. The variations of phraseology between the U.S. Constitution and the Connecticut Constitution are without significance. There was no extra protection given by our constitutional framers to liquor licenses who seek to entertain their customers with nude activity. This is a valid regulation [section 30-6-A24(d)(e)] needed and used to control the liquor selling by the drink industry, and is clearly constitutional."

CONCLUSION

The Court finds that the defendant Division of Liquor Control did not act illegally, arbitrarily or in abuse of its discretion. The plaintiffs' appeal is dismissed.

/s/ O'CONNOR
O'Connor, J.

Brief of the Petitioner/Appellant in the Connecticut Appellate Court

(Pages 5-12)

* * * * *

I. *The Regulation is Unconstitutional Under Connecticut's Speech Clauses, Whether or Not They are Identical to the Federal First Amendment and because The Twenty-First Amendment Only Curtails Federal Constitutional Rights.*

Although such statutory bans have been held to be valid under the Federal Constitution by reason of the Twenty First Amendment,[1] the regulation at issue is invalid under the guarantee of freedom of expression of Connecticut's State Constitution, to which the Twenty First Amendment has no application. The authority of our state to regulate the sale and consumption of alcoholic beverages stems not from any grant in the Federal Constitution, but derives from the inherent police power of the State as a sovereign. "The power to legislate for the safety, health or welfare of its people is inherent in the state by virtue of its sovereignty." *Horwitz v. Town of Waterford*, 151 Conn. 320, 323, 197 A2d 636 (1964). The exercise of the police power is subject to the strictures of our State Constitution of which the guarantee of freedom of expression found in Article 1, Sections 4 and 5 is controlling. As there is no analogous provision to the Twenty First Amendment in the Constitution of the State of Connecticut, the state may not violate its own constitutional guarantees to prohibit a protected form of expression when exercising its police power.

The trial judge erred in mistakenly supposing that the Twenty First Amendment grants additional power to the state. The state police power is all-encompassing. It is limited only by the affirmative constraints of the Federal Constitution: for

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1 *California v. LaRue*, 409 U.S. 109 (1972). Section 2 of the Twenty First Amendment states "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited."

instance, the Fourteenth Amendment and the Bill of Rights guarantees which that amendment incorporates. *Bigelow v. Virginia*, 421 U.S. 809, 825, n.10 (1975); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 165 (1973); *Patch Enterprises, Inc. v. McCall*, 447 F. Supp. 1075, 1080 (M.D. Fla. 1978); *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 445 N.Y.S. 2d 87, 429 N.E. 2d 765 (1981) citing 9 N.Y. Jur., Constitutional Law, Sec. 143; U.S. Const. 10th Amdt. Because the police power is all-encompassing, it is sufficient in and of itself to regulate public health, safety and welfare. *Bridgeport Hydraulic Co. v. Council on Water Co. Lands of State of Conn.*, 453 F.Supp. 942 (D.C. Conn. 1977) aff'd. 439 U.S. 999 (1978). By definition, it need not and cannot be supplemented with another outside source such as the Twenty First Amendment of the Federal Constitution.[2]

Therefore, in essence, the Twenty First Amendment does not *grant* power to the states, but rather *restores* the absolute power of the state to prohibit totally, and consequently to regulate, the sale of alcoholic beverages without federal constitutional interference. Its effect, in short, is to repeal the *federal* First Amendment's affirmative limitation upon state police power to regulate liquor establishments. It "supplements" state power, not by adding to the original power, but by removing *Federal* constitutional constraint upon that power. It does not and cannot repeal the analogous speech clauses of state constitutions. *Bellanca*, Supra at 90.

The trial judge also erred in holding that plaintiffs can only prevail if Connecticut state courts construe Connecticut's speech clause more broadly than the First Amendment. Connecticut courts, of course, have the power to do so. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *State v. Coleman*, 96 Conn. 190, 113 A.2d 385 (1921). It is not

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2 The all-encompassing nature of the state's police power, except as limited by the Federal Constitution, has been recognized since the earliest days of the Republic. *Mayor, Aldermen and Commonalty of City of N.Y. v. Miln*, 36 U.S. 102, 141 (1837); *Thurlow v. Com. of Mass.*, 46 U.S. 504, 527-29 (1874); *Newton v. Mahoning County Com'rs.*, 100 U.S. 548, 559 (1879). It is inconceivable that one can add to something that is complete in itself.

necessary, however, that they exercise this power in the present case. It is merely necessary to recognize, first, that the Twenty First Amendment does not curtail Connecticut speech protections as it does federal ones; and, second, that the State's Constitution contains no counterpart to the Twenty First Amendment. Thus, Connecticut's speech clause, as applied to liquor establishments, need only be given the exact content that the First Amendment would retain if the Twenty First Amendment did not exist.[3]

The State Constitution of New York contains a free speech provision that is identical to that of Connecticut. Indeed, New York and Connecticut have consistently interpreted their respective speech clauses similarly. See *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984) and *SHAD Alliance v. Smith Haven Mall*, 498 N.Y.S. 2d 49, 66 N.Y. 2d 496, 488 NE 2d 1211 (1985). The Court of Appeals, New York's highest Court, has recently decided a case that is materially identical to the one at hand in *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 445 N.Y.S. 2d 87 (1981). That case arose when the New York State Legislature passed a statute prohibiting nude dancing in premises licensed by the State Liquor Authority. On initial consideration, the New York Court of Appeals held that the provision was unconstitutional under the First Amendment of the U.S. Constitution. The United States Supreme Court upheld the validity of the statute against challenge under the Federal Constitution on the ground that the broad provisions of the Twenty First Amendment substantially curtailed the operative scope of the First Amendment. On remand, however, the Court of Appeals of New York determined that the Twenty First Amendment of

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3 Indeed, the Federal Supremacy Clause, (U.S. Const. Art. VI) makes such a construction mandatory. Under the Supremacy Clause, a state must interpret its own individual rights guarantees at least as broadly as the federal ones. *Pruneyard Shopping Center v. Robin*, 447 U.S. 74 (1980); *Fasulo v. Arafeh*, 173 Conn. 473, 378 A.2d 553 (1977). Since Connecticut has no Twenty First Amendment to curtail its speech clauses, one could only deny protection to plaintiffs' activities by narrowing the scope of the state speech clauses below the federal minimum. This, the Supremacy Clause forbids.

the Federal Constitution was irrelevant and that the statute was invalid because it violated the guarantees of freedom of expression contained in the State Constitution. The court stated that the New York Constitution:

> contains no provision modifying the state guarantee of freedom of expression, corresponding to what the Supreme Court has held as the diminishing effect of the Twenty First Amendment with respect to the Federal guarantee of freedom of expression.

The United States Supreme Court denied cert. on June 1, 1982.

Likewise, in the instant case, Section 30-6-A24(d) and (e) of the Regulations of the Division of Liquor Control is unconstitutional under the provisions of our State Constitution. It is perfectly clear that the First Amendment, if uncurtailed by the Twenty First Amendment, would condemn the total ban on protected expression that the challenged regulation imposes in the instant case. *Kev*, Supra at 1058. This is so for two reasons.

First, there are less restrictive alternatives—e.g. licensing requirements, disclosure and reporting requirements, a requirement of distance between dancers and patrons and the prohibition of fondling and tipping—which adequately protect government interests in maintaining order. A total ban, therefore, is more restrictive than necessary and thus unconstitutional. *Kev*, Supra at 1059; *Bellanca II*, Supra 445 N.Y.S. at 88.[4] See generally, *Shelton v. Tucker*, 364 U.S. 479 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958).

Second, the agency has failed to articulate a compelling interest as required in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975), or advance any evidence in support of the regulation. "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980). Accord, *Tinker*

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4 *Kev* and *Bellanca*, of course, merely exemplify the long-standing principle that "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . ." *Young v. American Mini-Theaters*, Supra at 80; *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Village of Schaumburg v. Citizens, Etc.*, 444 U.S. 620, 634 (1980).

v. Des Moines Independent School District, 393 U.S. 503, 508 (1969); *Iacobucci v. City of Newport, Ky.*, 785 F.2d 1354, 1359 (6th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851, 856 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1203, 1540 (11th Cir. 1985); *Basiardines v. City of Galveston*, 682 F.2d 1203, 1215 (5th Cir. 1982); *International Food v. City of Fort Lauderdale*, 614 F.Supp. 1517, 1521 (S.D. Fla. 1985). Thus, if the state's interest is to promote order, the interest fails for lack of evidence that a ban on topless dancing will achieve it.[5] If the concern is for morality, morality does not provide a sufficiently compelling interest for eradicating fundamental constitutional rights. *Roe v. Wade*, 410 U.S. 113 (1973); *Leverett*, Supra at 1540-41. These failures also doom the regulation under equal protection and due process analysis. See Sections III and IV, *infra*.

In *Kev*, the plaintiff did not sell liquor on the premises. Therefore, the Twenty First Amendment was irrelevant. Accordingly, the Court of Appeals for the Ninth Circuit applied traditional First Amendment analysis. Under this analysis, it sustained licensing, reporting, and similar requirements because they constituted less restrictive alternatives to a total ban. It is clear that a total ban would have been roundly condemned.

Similarly, Courts have held that the Twenty First Amendment, by itself, does not apply to municipalities. Thus, it is irrelevant to municipal regulation of nude or semi-nude entertainment at liquor establishments, unless the state has delegated its own restored police power under that Amendment to the municipal government. *Krueger*, Supra at 854; *Iacobucci*, Supra at 1358. Absent such delegation, the municipality cannot invoke the Amendment's shield, and its actions are subject to the full and rigorous scrutiny of the federal speech clause. *Id.*

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5 See Hearing on Regulation, October 16, 1979, pp. 9, 17 (Testimony of Inspector Poplawski, Chief Enforcement Officer of the Liquor Control Division). Significantly, even *LaRue* (f.n.1 supra), with its relaxed standard of scrutiny emphasized the existence, in California, of legislative hearings and fact findings.

As plaintiffs have stated, the Connecticut and federal speech clauses are identical except to the extent that the Twenty First Amendment limits the latter. Since the Twenty First Amendment is irrelevant to *state* constitutional protection of topless dancing—precisely as it is irrelevant where no liquor is served, or when municipal rather than state regulation is involved—Connecticut should follow *Bellanca, Kev* and *Krueger* by striking down the state's blanket prohibition of protected expression under Connecticut Constitution, Article I, Sections 4 and 5.

II. *The Connecticut Constitution Gives Broader Rights of Free Expression than the First Amendment of the United States Constitution.*

As stated in the preceding section, it is not necessary that the Court expand Connecticut's speech clauses beyond the federally required minimum in order for plaintiffs to prevail. Nonetheless, plaintiff's rights under the Connecticut Constitution exceed those of the U.S. Constitution. The Constitution of the State of Connecticut provides an independent source of protection for individual liberties. *Horton v. Meskill*, 172 Conn. 615, 376 A2d 359 (1977). The free speech protections of the State Constitution give broader rights of individual expression than does the Federal Constitution.

> Federal law, whether based upon statute or constitution, establishes a minimum national standard for the exercise of individual rights and does not inhibit state government from affording higher levels of protection for such rights.

Brief of the Respondent/Appellee in the Connecticut Appellate Court

(Pages 8-16)

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IV

ARGUMENT

A. Regulation Section 30-6-A24(d), (e) is a valid exercise of the State's power to ban nude conduct at permit premises as part of its liquor licensing program.

Section 2 of the Twenty-First Amendment to the United States Constitution grants the states virtually complete control over whether to permit importation or sale of liquor. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Although the fact that the product being regulated is liquor does not qualify individual rights protected by the bill of rights or the Fourteenth Amendment, *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), this amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). Similarly, our Supreme Court has often repeated the principle, "Because of the danger to the public health and welfare inherent in the liquor traffic, the police power to regulate and control it runs broad and deep, much more so than the power to curb and direct ordinary business activity." *Ruppert v. Liquor Control Commission*, 138 Conn. 669, 674, 88 A.2d 388 (1952).

Laws such as the regulation in the instant case have often been litigated, and at this stage in the development of the law it is clear beyond any reasonable doubt that with respect to federal free speech challenges, a state can ban topless dancing and other nude conduct, regardless of whether it is obscene, as

part of its liquor licensing program. See *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (*Bellanca I*); *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *California v. LaRue*, supra; *State v. Baysinger*, 397 N.E.2d 580 (Ind., 1979), appeal dismissed sub. nom., *Clark v. Indiana*, 446 U.S. 391, 100 S.Ct. 2146, 64 L.Ed. 2d 783 (1980). Noting that the broad powers of the States to regulate the sale of liquors conferred by the Twenty-First Amendment outweighs any First Amendment interest in nude dance, the U.S. Supreme Court held, "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Bellanca I*, 452 U.S. at 717.

Plaintiffs nevertheless advocate that the Department's nude conduct regulation may be vulnerable under state free speech challenges because there is no provision similar to the Twenty-First Amendment embodied in the state constitution which might mitigate their state constitutional rights. Plaintiffs' Brief, p. 5. Such arguments found favor in *Belanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 445 N.Y.S. 2d 87, 429 N.E.2d 765 (1981) cert. denied, 456 U.S. 1006, 102 S.Ct. 2294, 73 L.Ed.2d 1300 (1982) (*Bellanca II*), *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978) and *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska, 1982); but see *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla., 1985); and *Nall v. Bacca*, 95 N.M. 783, 626 P.2d 1280 (1980). However, in *Bellanca II*, the New York court did not consider the effect of the Twenty-First Amendment because the State seemingly did not assert that as the State's source of authority to regulate liquor traffic. Consequently, the court found that the authority of the State in this respect stemmed only from the State's inherent police power. This police power, ruled the court, was subject to the State free speech guarantee. 445 N.Y.S. at 91.

We submit that this analyis is incorrect. It is entirely inconsistent to reason that the Twenty-First Amendment power cannot be considered in a state constitutional challenge because

it does not exist in the State Constitution, and next identify the authority for state action as being the state's police power, which is also not present in the state constitution. Police powers are "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *McKeon v. New York, N.H. & H.R. Co.*, 75 Conn. 343, 347, 53 A.656 (1902) citing *The License Cases*, 46 U.S. (5 Howard) 504, 583, 46-49 S.Ct. 291 (1847). A state court must still consider the effect of a federal constitutional provision even in the context of a state constitutional challenge. The federal constitution is, in reality, a part of the constitution of every state. U.S. Const., Art. VI, Sec. 2; 16 Am. Jur. 2d, Const. Law, Sec. 13, p. 325 citing inter alia *State v. Conlon*, 65 Conn. 478, 484, 33 A. 519 (1895).

We especially agree with Judge Jansen's dissent in *Bellanca II*, wherein he wrote:

> Lest there be any further doubt on the subject, this court, on a prior occasion, has made clear that, notwithstanding a restoration of the normal police power, 'the Twenty-first Amendment spells out *an additional specific and federally protected right* of each State to eliminate as well as regulate the liquor traffic within its borders.' (*Seagram & Sons v. Hostetter*, 16 N.Y.2d 47, 56, 262 N.Y.S. 2d 75, 209 N.Ed.2d 701, affd. 384 U.S. 35, supra, 86 S.Ct. 1254, 16 L.Ed.2d 336 [emphasis suppled].) Given the undisputed existence of this State's right under the Federal Constitution to regulate the sale of liquor, it is difficult to understand the majority's view, unsupported by the citation of any authority, that the Twenty-first Amendment has 'no application' to our State Constitution. This Federally recognized power on the part of the States to control the commercial distribution of alcoholic beverages within their respective boundaries does not exist in a vacuum; nor is it limited to the confines of the Federal Constitution. The power conferred by the Twenty-first Amendment simply does not evaporate once the analysis shifts to a determination of the right to free expression

> under our State Constitution. Rather, this independent, Federal right to control the traffic in liquor subsists and, pursuant to the supremacy clause, must be given full recognition and effect—even when considering the provisions of our own Constitution.

445 N.Y.S.2d at 96.

Bellanca II is also distinguishable because there, the court struck down the New York law only insofar as it prohibited non-obscene topless dancing. Several of the instant cases concern completely naked antics and physical contact with patrons. Even in Massachusetts, where topless dancing is also allowed under the state constitution's free speech provision, mingling with patrons is validly banned, state constitutional rights notwithstanding. *Aristocratic Restaurant v. Alcoholic Bev. Control Comm'n* (No. 1.) 374 Mass. 547, 374 N.E.2d 1181 (1978).

Plaintiffs' analysis of the free speech rights ignore the "critical factor" identified by the trial court, i.e. that the prohibition applies only to liquor establishments.[3] Trial Court Decision, App. A, p. 11a. This regulation does not purport to restrain nudity or restrict access to a particular form of expression. Rather it is directed at the privilege of selling liquor. It prohibits selling liquor where there is conduct in violation of the terms of the regulation. *LaRue*, 409 U.S. at 114; *Richter v. Dept. of Alcoholic Beverage Control*, 559 F.2d 1168, 1172 (9th Cir., 1977) cert. denied 434 U.S. 1046, 98 S.Ct. 891, 54 L.Ed.2d 797 (1978). Thus, the courts have held, "For a liquor control regulation to be valid . . . all that is required is that a relation exist between the contested enactment and some valid regulatory purpose which is not wholly irrational." *Inturri v. Healy*, 426 F.Supp. 543, 547 (D. Conn., 1977). The rationality of this regulation has been repeatedly upheld. See,

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3 It is important to distinguish this case from those where the Twenty-First Amendment was not involved or liquor was not involved. Compare, *Doran v. Salem Inn*, 422 U.S. 922, 933; *Salem Inn, Inc. v. Frank*, 408 F. Supp. 852, 855 (E.D.N.Y., 1976); *Moore v. Liquor Control Commission*, 36 Conn. Sup. 305, 418 A.2d 955 (1980).

e.g. *Inturri*, supra at p. 549; *Winer v. Healy*, Civil No. H-79-26 (Slip Op., D.Conn., Aug. 24, 1979) App. B, p. 13a; *Cianci v. Div. of Liq. Cont.*, Htfd No. 252783 and its companion case *Dydyn v. Div. of Liq. Cont.*, Htfd No. 244300 (*Cianci & Dvdyn I*) pet. for cert. to app. denied (Oct. 14, 1981) cert. denied 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982) App. C, p. 29a; *Tannenbaum v. State of Connecticut*, Htfd No. 286271 (Aug. 28, 1985) App. D, p. 38a. The record in this case also rings clear the need for the regulation. See, e.g., Remarks of Chairman John F. Healy, Transcript of December 20, 1979 at p. 68-72, App. E, p. 43a, Administrative Records; Report of Agent Moriarity of July 18, 1980, App. F, p. 48a, Administrative Records. As Commissioner David L. Synder remarked:

> I think also it should be pointed out that it has been the experience of this Commissioner that this regulation served to prevent unlawful and disorderly conduct on the permit premises. We have had cases, where after a violation of this regulation has occurred, there have been brawls. There have been arrests for sexual contact. It has served a purpose and it continues to serve a purpose. I can only speak for myself, but that has been my experience.

Transcript of Dec. 20, 1979 at p. 67; App. G at p. 49a; Administrative Records.

In this perspective, the U.S. Supreme Court in *LaRue* determined that a liquor control board's nudity law is not an anti-obscenity law to be reviewed under the First Amendment tests of *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) or *United States v. O'Brien*, 321 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). We thus believe that this regulation is a valid exercise of the State's Twenty-First Amendment powers, regardless of whether the context is a federal or state constitutional challenge.

B. The Connecticut Constitution gives no broader rights of Free Expression than the First Amendment to the United States Constitution with respect to nude conduct at liquor permit premises

In an effort to distinguish the long line of federal cases validating liquor control proscriptions similar to that challenged in the instant case, Plaintiffs contend that the free speech provisions of the Connecticut Constitution afford them greater rights to offer nude entertainment at liquor

Reply Brief of the Petitioner/Appellant in the Connecticut Appellate Court

(Pages 2-7)

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4. Did the trial court err in holding that the challenged regulation does not violate Plaintiffs' due process rights and that the Department did not act beyond its sphere of authority in promulgating the regulation? 27

II

STATEMENT OF THE FACTS

These cases are all administrative appeals from decisions of the Defendant, Department of Liquor Control (hereinafter "Department") suspending the Plaintiffs' liquor permits for violations of the Department's nude conduct regulations, 7 Reg. Conn. Agencies, Liq. Control, Sec. 30-6-A24(d), (e). In cases involving the Plaintiffs Victor R. Dydyn, permittee, and The Culinary Cafe, Inc., backer, the permit was suspended for a total of 35 days.[1] In cases involving Paul J. Cianci, permittee, and The Dealer's Choice Lounge, Inc., backer, the permit was suspended a total of 45 days.[2] The facts, as found by the agency in each case, are not in dispute. All cases involve female dancers observed performing at the permit premises in various

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1 The Dydyn cases are as follows: A.C. No. 5302, Dept. Dec. of June 23, 1981, 15 day suspension; A.C. No. 5304, Dept. Dec. of November 2, 1982, 10 day suspension; A.C. No. 5306, Dept. Dec. of August 30, 1983, 5 day suspension; A.C. No. 5308, Dept. Dec. of April 26, 1984, 5 day suspension.

2 The Cianci cases are as follows: A.C. No. 5303, Dept. Dec. of December 22, 1981, 20 day suspension; A.C. No. 5305, Dept. Dec. of August 30, 1983, 5 day suspension; A.C. No. 5307, Dept. Dec. of March 1, 1984, 5 day suspension; A.C. No. 5309, Dept. Dec. of January 10, 1985, 15 day suspension.

states of nudity in violation of the regulation. In particular cases dancers were also found fondling their breasts or genital areas, allowing patrons to stuff money in their costumes, mingling with and kissing patrons, and simulating sexual intercourse during their routines. See Department Decisions, Record. In each case Plaintiffs challenged the validity of the Department's action in promulgating the regulation, and they challenged its constitutionality. The trial court, by decision dated July 10, 1986, rejected all challenges and dismissed the appeals. See Trial Court Decision, Appendix A, p. 3a. Plaintiffs appealed on July 24, 1986 to this court and on September 12, 1986 the cases were combined for purposes of appeal.

III

CONSTITUTIONAL PROVISIONS AND REGULATION IN ISSUE

U.S. Const. Amend I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Cont. Amend. XXI, Sec. 2:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Conn. Const. Art. 1, Sec. 1:

> All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.

Conn. Const. Art. 1, Sec. 4:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

Conn. Const. Art. 1, Sec. 5:

> No law shall ever be passed to curtail or retrain the liberty of speech or of the press.

Conn. Const. Art. 1, Sec. 20:

> No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

7 Reg. Conn. Agencies, Liq. Control, Sec. 30-6-A24(d),(e):

> (d) No person shall be employed or otherwise used on permit premises while such a person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonable exert control, shall be permitted to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> (e) No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which stimulate: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching, caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the

pubic hair, anus, cleft of the buttocks, vulva or genitals. No permittee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the department upon written request indicating the desirability and necessity for entertainers to mingle with the patrons.

Petition for Certification to the Supreme Court of the State of Connecticut

(Pages 1-2, 4-5, 7-9)

SUPREME COURT

STATE OF CONNECTICUT

OCTOBER 5, 1987

NOS. A.C. 5402, 5404, 5406, 5408

VICTOR R. DYDYN, ET AL

v.

DEPARTMENT OF LIQUOR CONTROL:

PETITION FOR CERTIFICATION

The plaintiffs petition the Supreme Court for certification from the judgment of the Appellate Court in this case.

1. The questions presented for review are as follows:

a. Did the Appellate Court err in applying intermediate review, instead of strict scrutiny, to a gender-based classification under Article First, Section 20 of the Connecticut constitution (the Equal Rights Amendment)?

b. Did the Appellate Court err in holding that state liquor regulations, which prohibit females, but not males, from

dancing "topless" in bars, do not violate Connecticut Constitution, Article First, Section 20?

c. Did the Appellate Court err in holding that the Twenty-First Amendment to the United States Constitution expands the police power of the Connecticut legislature even against the speech clauses of its own State Constitution, so that state liquor regulations, which prohibit nude and semi-nude entertainment in bars, do not violate Connecticut Constitution, Article First, Sections 4 and 5?

d. Did the Appellate Court err in holding that state liquor regulations, which prohibit nude and semi-nude entertainment in bars, only regulate liquor sales, and do not regulate speech?

2. The basis for certification is as follows:

a. The Appellate Court has decided a question of substance, namely, the applicability of Connecticut's Declaration of Rights to nude and semi-nude entertainment in bars, not theretofore determined by the Supreme Court *and* has decided it in a way probably not in accord with applicable decisions of the Supreme Court. See *Page v. Welfare Commissioner*, 170 Conn. 258, 267 (1976), which refers in powerful dicta to "the strict scrutiny test mandated by the equal rights amendment."

b. At least two questions of great public importance are involved. One is the applicability of Connecticut's Declaration of Rights, specifically, Article First, Sections 4, 5 and 20, to nude and semi-nude entertainment in bars. The other is whether the Appellate Court applied the correct standard of review to gender-based classifications under Article First, Section 20 (the Equal Rights Amendment).

c. The following public interest groups have represented to plaintiffs' counsel that, if certiorari is granted, they will apply for permission to appear as amicus curiae and file a brief in support of

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requirement. Other portions of the Regulations, forbidding specified sexual acts, are not germane to the lawsuit.

Victor Dydyn, permittee of The Culinary Cafe in Newington, Connecticut, and Paul J. Cianci, permittee of Dealer's Choice Lounge, Inc., in Hartford, Connecticut, appealed to the Superior Court after their liquor licenses were suspended for allegedly violating the regulations. The suspensions were sustained. They then appealed to the Appellate Court, which found no error. Only Dydyn petitions for certification.

The Appellate Court decided the questions presented in Paragraph One, above, as follows:

a. Although statutes or regulations which distinguish between male and female anatomy are gender-based under Connecticut Constitution, Article First, Section 20, the appropriate standard of review is intermediate scrutiny, as applied by the United States Supreme Court under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, rather than strict scrutiny. 12 Conn. App. at 464.

b. The challenged regulations survive intermediate review, and are therefore constitutional under Connecticut Constitution, Article First, Section 20. 12 Conn. App. at 464-5.

c. The Twenty-First Amendment to the United States Constitution expands the police powers of the Connecticut Legislature even against the speech clauses of its own state Constitution, and therefore legislatively-authorized state liquor regulations, which prohibit nude and semi-nude entertainment in bars, do not violate Connecticut Constitution, Article First, Sections 4 and 5. 12 Conn. App. at 460-462.

d. State liquor regulations, which prohibit nude and semi-nude entertainment in bars, only regulate liquor sales, and do not regulate speech. 12 Conn. App. at 463 n. 10.

The Appellate Court also resolved other state constitutional issues adversely to the plaintiffs. Plaintiffs, however, do not seek certification for review of those issues.

4. Argument.

a. The Appellate Court correctly identified the regulations as gender-based under Article First, Section 20. This is so even though they classify according to a uniquely female anatomical characteristic, and therefore would not be treated as gender-based for purposes of federal constitutional analysis. *Geduldig v. Aiello*, 417 U.S. 484 (1974). One reason why proponents urged the adoption of Equal Rights Amendments, at both the state and national levels, was to overturn *Geduldig*. See Statement of Thomas Emerson Before the Government Administration and Police Committee of The Connecticut General Assembly on Proposed Regulation to Rescind Connecticut's Ratification of the Equal Rights Amendment, March, 1977.

* * * * *

seq. Finally, it sets at naught a fundamental principle of constitutional construction, by rendering the Connecticut Equal Rights Amendment superfluous—a mere reflection of the federal Fourteenth Amendment—in most sex discrimination cases. See *Cahill v. Leopold*, 141 Conn. 1 (1954).[1]

b. The application of strict scrutiny, requiring a close fit to a compelling end, see *Loving*, *supra*, should alter the outcome of these cases, inasmuch as the exposed male torso can be erotic to women and homosexuals. Thus, the challenged regulations are fatally underinclusive.

c. The Appellate Court's rejection of plaintiffs' state constitutional speech argument rests upon a fundamental misunderstanding of one of the first principles of federal constitutional law. Under the federal Constitution, the First Amendment limits state police power over speech, including

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1 If anything, it is especially important to scrutinize strictly all classifications based on physical characteristics unique to one sex, lest these characteristics be pretexts for invidious discrimination. See Testimony of Professor Ann E. Freedman Before the Subcommittee on Civil and Constitutional Rights of the House Judicial Committee on H.J.Res. 1, the Equal Rights Amendment at 5.

certain forms of nude entertainment. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The Twenty-First Amendment to the United States Constitution, which authorizes states to regulate liquor within their borders, has been construed to repeal the First Amendment wherever liquor is served. *California v. LaRue*, 409 U.S. 109 (1972). Thus, as far as the federal Constitution is concerned, states may regulate expression in bars in any manner they choose, subject only to a rational relation test. *Id.*

The Appellate Court, however, held that the Twenty-First Amendment expands the state's police power, so as to override even the speech guarantees of the state's own constitution. This is a constitutional impossibility. It is, literally, hornbook law that the state's police power is boundless, except insofar as it may be limited by the federal Constitution. Nowak, Rotunda and Young, Constitutional Law (2d ed.) at 121. The Twenty-First Amendment, therefore, in no sense "expands" state police power. One cannot expand infinity. Rather, the Amendment *restores* the police power, by repealing First Amendment limitations on that power. It cannot and does not repeal analogous state constitutional restrictions. Only a state constitutional counterpart to the Twenty-First Amendment could accomplish this. Contrary to what the Appellate Court concluded, 12 Conn. App. at 462, the Twenty-First Amendment does not become part of our own Constitution by operation of the federal supremacy clause. It is one thing to hold that Connecticut constitutional provisions must afford at least the same rights as the federal instrument. *Fasulo v. Arafeh*, 173 Conn. 473 (1977). It is quite another to hold that a state constitution must allow the Legislature the same *powers* that the federal Constitution allows it. To do so, indeed, would eliminate the state's acknowledged authority to impose greater individual rights restrictions upon the Legislature than the federal Constitution demands. *Fasulo, supra.*

Since Article First, Sections 4 and 5 must afford at least as much protection as the federal First Amendment, *Fasulo, supra*, and since these clauses are unaffected by the Twenty-First Amendment, it follows that nude dancing must receive

the same protection under the State Constitution that it would enjoy under the federal if the Twenty-First Amendment did not exist. Under the First Amendment, nude and semi-nude dancing are protected forms of expression and cannot be subject to blanket bans in places where the Twenty-First Amendment does not apply. *Doran*, *supra*. Because the Twenty-First Amendment is inapplicable to state constitutions, Article First, Sections 4 and 5 insulate these art forms against such bans in bars as anywhere else. It is not necessary to expand the two sections beyond the federal minimum in order to reach this result. One need only recognize that the Twenty-First Amendment does not diminish them as it does their federal counterpart.

The decision below clashes with decisions in other jurisdictions that correctly explain the role of the Twenty-First Amendment and its irrelevance to state constitutional law. See *Bellanca v. New York State Liquor Authority*, 429 N.E. 2d F65, 445 N.Y.S 2d 87 (1981); *Mickens v. Kodiak* 640 P.2d 818 (Alaska 1982); and *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978).

No. 87-1326

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

VICTOR R. DYDYN,
Petitioner,

v.

DEPARTMENT OF LIQUOR CONTROL,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

In a State administrative appeal challenging the validity of a state liquor control regulation banning nude conduct at a permit premises:

1. Did the State court err in concluding that the Twenty-first Amendment to the United States Constitution confers authority on the States to regulate liquor, even against the free speech clauses of the Connecticut Constitution?

2. Did the State court err in giving full recognition and effect to the Twenty-first Amendment pursuant to the Supremacy Clause of the United States Constitution, even against the free speech clauses of the Connecticut Constitution?

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STATEMENT OF THE CASE

The Respondent, Department of Liquor Control, accepts the statement of the case presented by Petitioner, excluding legal arguments contained therein and except to note that the Petitioner's permit premises was ordered suspended for 35 days for violation of the regulation, not 45 days. Additionally, Respondent agrees that Connecticut never expressly adopted, as part of its state constitution, a provision similar to the Twenty-first Amendment. Petitioner's Brief p. 6. However the Twenty-first Amendment to the United States Constitution was ratified by Connecticut on July 11, 1933. Res., 73d Congress, 2d Sess., 78 Cong. Rec. 38-40 (1934).

REASONS FOR DENIAL OF THE PETITION

1. The case below essentially was decided on state law grounds.

It is beyond any reasonable doubt that, against federal free speech challenges, a state can ban topless dancing and other nude conduct, regardless of whether it is obscene, as part of its liquor licensing program pursuant to the Twenty-first Amendment of the United States Constitution. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) *(Bellanca I); Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972). *See also State v. Baysinger*, 397 N.E. 2d 580 (Ind. 1979), *appeal dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980). Recognizing this obstacle in the case below, Petitioner, *inter alia*, challenged Connecticut's liquor control regulation proscribing nude conduct at permit premises as violative of the free speech provisions of the Connecticut Constitution. This state constitutional issue is clearly a matter of state law, and so is the Twenty-first Amendment issue. Assuming that the Twenty-first Amendment confers powers on the states, it is within the prerogative of the states whether to exercise that power. Connecticut exercises that power as a matter of state law. Thus, the resulting decision essentially is a matter resting on independent and adequate state law grounds beyond review by a Writ of Certiorari, and the petition should be denied accordingly.

2. The case below raises no significant issues of federal law concerning the Twenty-first Amendment.

In an effort to articulate some substantial federal issues in this case within the jurisdiction of this Court, Plaintiff argues that the Connecticut court erred in stating that the Twenty-first Amendment grants additional police power to the states to regulate liquor. Rather, he argues, the Amendment ". . . merely repeals federal First Amendment limitations . . ." and "[i]ts only effect, therefore, is to restore to the

states their original, inherent, plenary police power . . ." which is subject to state constitutional guarantees. Petitioner's Brief, p. 4.

The argument is 55 years too late. Virtually since its enactment, the Twenty-first Amendment has been interpreted by this Court as conferring on the states "more than the normal state authority over public health, welfare and morals." *California v. LaRue*, 409 U.S. at 114. The states may delegate this broad power as they see fit. *City of Newport, KY. v. Iacobucci*, 107 S.Ct. 383, 385 (1986). Also, while earlier decisions of the Court often and forcefully shielded state liquor policy from federal oversight, *see, e.g., State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 64 (1936), modern case law makes it crystal clear that the Twenty-first Amendment does not repeal other federal constitutional provisions. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The state court decision below is in harmony with modern Twenty-first Amendment case law on both points. The impact of Connecticut constitutional provisions on this authority is a state-law question.

3. The Supremacy Clause of the United States Constitution was not misused to bar potential expansion of state constitutional rights.

The lower court correctly decided that Connecticut's Twenty-first Amendment authority does not reach a wall once state constitutional challenges are raised. The Supremacy Clause, cited by the court on this point, dictates this result by its plain words:

> This Constitution . . . shall be the Supreme Law of the Land; and the Judge in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.
>
> U.S. Const. art. VI cl. 2

The applicability of the Twenty-first Amendment did not foreclose the lower court from considering Petitioner's state constitutional arguments. However, the lower court found Petitioner's state free speech rights to be co-extensive with the First Amendment and found "no reason or authority for the proposition that the state freedom of speech provisions should be read more broadly than their federal counterparts" in this case. *Dydyn v. Dept. of Liquor Control*, 12 Conn. App. 455, 463, 531 A.2d 170 (1987); Petitioner's Brief, App. A, p. A-9. Nor did the lower court find significance in the fact that there was no enactment similar to the Twenty-first Amendment in Connecticut's Constitution. *Id.* at 461; Petitioner's Brief, App. A, p. A-7. Consequently, the result in this case follows the result in cases where similar regulations were upheld against federal First Amendment challenges. While other states protect naked dancing at liquor permit premises under their state constitutions; *see Mikens v. City of Kodiac*, 640 P.2d 818 (Alaska 1982); *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 288, 429 N.E. 2d 765, 45 N.Y.S. 2d 87 (1981), *cert. denied* 456 U.S. 1006 (1982) *(Bellanca II); Commonwealth v. Sees*, 374 Mass. 352, 373 N.E. 2d 1151 (1978); Connecticut joins the states that do not. *See City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985); *Nall v. Bacca*, 95 N.M. 783, 626 P.2d 1280 (1980). Petitioner's argument suggesting the misapplication of the Supremacy Clause is so devoid of merit that it should not be considered as raising a substantial federal question.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted.

DEPARTMENT OF LIQUOR CONTROL

Respondent

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